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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 212

HURON HOLDING CORPORATION and NATIONAL SURETY CORPORATION,

Petitioners,

vs.

LINCOLN MINE OPERATING COMPANY

Respondent.

BRIEF FOR RESPONDENT

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Opinions of the Courts Below.

In an action in claim and delivery in the United States District Court for the District of Idaho, Southern Division, Lincoln Mine Operating Company, plaintiff, recovered a money judgment against Huron Holding Corporation, defendant, on March 3, 1938. This judgment was affirmed by the Circuit Court of Appeals, Ninth Circuit, on February 7, 1939, by an opinion reported in 101 Fed. (2nd) 458.

On Huron Holding Corporation's motion for satisfaction of judgment and on Lincoln Mine Operating Company's motion for judgment against surety on appeal bond after remand, the District Court granted the first motion and denied the second motion in an opinion reported in 27 Fed. Supp. 720.

The Circuit Court of Appeals for the Ninth Circuit then reversed the District Court in an opinion reported in 111 Fed. (2nd) 438, which is the opinion now on review. For this opinion see Record at pages 74 to 78.

Nature of the Case.

The instant proceeding will determine if a money judgment returned in a Federal court in one State, while on appeal and undecided by the Federal Appellate court and while payment of said judgment is stayed by a bond conditioned on the successful prosecution of the appeal, can be attached by the judgment creditor's creditor in a State court of another State wherein the judgment debtor resides and the judgment creditor is a non-resident. The Petitioner contends affirmatively and the Respondent contends negatively.

Parties.

The parties are as stated by the Petitioner and they will be referred to herein as in Petitioner's Brief so that there will be no confusion. (Petitioner's Brief, page 3).

Facts.

The Respondent accepts the facts as stated by the Petitioners with the following corrections and additions.

A warrant of attachment was issued out of the State Court on July 12th, 1938, but it was not "duly" issued, or issued pursuant to the provisions of the New York Civil Practice Act, Section 902, et seq., (Petitioners' Brief, page 4, lines 7 et seq.) and, consequently, all proceedings in the State Court were and are nil.

The mandate of the Circuit Court upon its affirmance of the judgment of March 3, 1938, was dated March 9th, 1939. (R. 6-8).

Summary of Argument.

POINT I.

The jurisdiction of the New York State Court in the action brought by the Trust Company against Lincoln depended solely upon attachment proceedings.

This is conceded by the Petitioners in their brief in Point I at page 9, where it is stated:

> "The New York Court had power to enforce its attachment proceedings against Huron, a New York corporation, and on that power was based its jurisdiction to bind the non-resident judgment creditor, Lincoln, to the extent of Lincoln's interest in the judgment debt attached."

POINT II.

The attachment proceedings in the New York State Court were void for the reason that on June 28, 1938, when the proceedings were initiated and on July 12, 1938, when the attachment was levied, the judgment debt was not attachable because (a) it was not absolutely payable at the time or in the future, and (b) payment of the debt was dependent upon a contingency which had not then happened.

Petitioners entire case is predicated upon the false premise that the State Court acquired jurisdiction and that the attachment was valid. But the attachmen was not valid,, and, therefore, the State Court had no jurisdiction.

In *Shipman Coal Company vs. Delaware & Hudson Co.*, 219 N.Y.S. 628; affirmed without opinion in 245 N.Y. 567, 157 N.E. 859, the Court said:

"**** (it—a money judgment) is attachable as a 'debt, a cause of action or demand' by service of the warrant upon the debtor or person against whom the demand exists ****"

"Since the judgment **** represents a cause of action, debt or demand, and it is not an "instrument for the payment of money' within Section 916 Civil Practice Act, *it ought to be treated in all respects like any other debt,* chose in action or intangible personal property*****." (Italics ours).

That being true, and the Shipman case is strongly relied upon by the Petitioners, we may examine the cases to ascertain when and under what circumstances a "debt" is attachable in New York.

In *Herman & Grace vs. City of N. Y.*, 114 N.Y.S. 1107, affirmed in 199 N.Y. 600, 93 N.E. 376, the New York Court used the following language:

"An attachment * * applies only to an amount which has become an indebtedness to the defendant whose property is attached, *at the time of the levy*, and not to an indebtedness which *may* accrue after the levy of attachment. * *

"It (contract payment) was not therefore a debt, or, in the language of the Code, a chose in action, when the attachment was levied, because it had not then become due, and would not become due until completion of the contract. *It is well settled that an indebtedness is not attachable unless it is absolutely payable at present, or*

in the future, and not dependable upon any contingency. Whether it would ever become a debt depended upon the contingencies that the contractors would complete their work, and, if they did not so complete, whether the city would elect to forfeit the contract, or would proceed to complete it at the contractor's expense." (Italics ours).

In *Frederick vs. Chicago Bearing Metal Co.*, 223 N.Y.S. 824, the New York Court held that though profits may never accrue, the *right* to them, if they did accrue, was existent and not contingent upon there ever being any profits. Upon appeal in opinion reported in 224 N.Y.S. 629, the Appellate Court said:

"But notwithstanding its putative value, it is merely a contingency, *which may never eventuate into a right.* It is a possibility of profit, but nothing may ever be payable under it. *If the liability is contingent, no attaching right exists.* Here there is no liability presently fixed to pay anything except upon the accident of profits accruing * *

"There can, then, be no attachment of, or levy upon, a contingent right, which may or may not become a cause of action according to the occurrence or non-occurrence of a future event. The attachment failing, the order of publication falls with it." (Italics ours).

In *Reifman vs. Watfield Co.*, 8 N.Y.S. (2) 591, after citing the case of *Herman and Grace vs. City of N.Y., supra,* and *Frederick vs. Chicago Bearing Metal Co., supra,* the Court stated:

"Even were the Exchange obligated to pay to the defendant the proceeds of the sale **** the right of the defendant to such proceeds would be contingent and equitable. ****. There is no liability presently fixed whereby the Exchange is obligated to pay anything to the corporation. *Contingent liabilities may not be attached.*

"It is well settled that an indebtedness is not attachable unless it is *absolutely payable at present or in the future, and not dependable upon any contingency.*" (Italics ours).

In *Sheehy vs. Madison Square Garden Assn.*, 266 N.Y. 44, 193 N.E. 633, which involved the right to attach moneys to become due under a contract to conduct rodeos over a period of years for the sum of $65,000.00 payable in installments, the Court said:

"There was therefore at that time (of attachment) no money or property right actually in existence to which the warrant could attach * *

"Plaintiffs * * urge that there was some property right arising out of the contract in the nature of a chose in action which was leviable. Johnson's right to payment at the time was entirely inchoate, contingent upon performance of the conditions with which it was his duty to comply. *He had no enforceable rights either in praesenti or in futuro.* Until he had satisfactorily performed, he was entitled to nothing. These were dependent conditions. Performance must precede payment. Choses in action are not ordinarily leviable.

> There must be a statute granting the right. Our statute (Civil Practice Act, section 916) provides that an attachment may be levied upon causes of action arising upon contract. But at the time of the levy Johnson had no cause of action; nothing but the right to earn money in the future. * * The present case is indistinguishable from (Herman & Grace vs. City of N.Y. supra)." (Italics ours).

In 28 Corpus Juris at page 241, under the title Garnishment, it is stated that plaintiff can acquire no greater rights against the garnishee than are possessed by the principal defendant.

At the time the Trust Company instituted its action in the State Court the obligation of Huron, the judgmen debtor, to Lincoln, the judgmen tcreditor, was not "absolutely payable at present or in the future" and payment was dependable upon a contingency.

At the time of the attachment, the payment of the debt due from Huron to Lincoln was stayed by a bond under the terms of which the judgment creditor could not enforce payment until some future time, and then only if the judgment debtor should "fail to make good its plea" on appeal. (R. 6) Whether the judgment debt would ever become payable depended at the time of the attachment on a contingency, viz., the decision of the Circuit Court. This decision was not rendered until February 7, 1939, and the mandate was not returned to the District Court until March 13, 1939. (R. 6-8).

If the attachment was not good at the time of the levy, it could never be made good in the future upon the happening of any event excepting a new levy. The decision of the Circuit Court did not and could not make the previous levy valid.

At all times Huron recognized the fact that the judgment debt was not due at the time of the levy and that it would not become due in the future except upon the happening of a contingency. And by reason of the following record in the State Court, the Trust Company was advised of that fact. When Notice of Property Attached (R. 29) was served upon Huron by the Sheriff of New York County, Huron made it written Certificate dated July 15, 1938 (R. 30) to the effect that it was the judgment debtor named in the judgment of March 3, 1938, and "that said judgment is still unpaid, subject to our rights on the appeal taken by us from said judgment and now pending in said court." (R. 30-31)

It is to be noted that Huron did not say it owed Lincoln any money by reason of the said judgment. It merely said it was the judgment debtor and, in effect, it would owe the judgment debt to Lincoln in the future if, as and when the Circuit Court should so decide. Clearly a statement that Huron owed no money at the time, and that any future debt was contingent.

In the Inventory and Appraisement dated July 22, 1938, (R. 26) the appraisers described the property exactly as it was in Huron's Certificate, and stated "that said judgment (of March 3, 1938) is still unpaid—subject to the rights of

said Huron Holding Corporation on the appeal taken by it from said judgment and now pending in said court." (R. 27).

At the time the garnishment proceedings were commenced, Lincoln could not have required any payment of money from Huron. Therefore, it follows that the Trust Company could not force any payment and could only acquire whatever rights Lincoln had. These rights were contingent and a levy upon a contingent right will not sustain the jurisdiction of the State Court.

Petitioners base their contention that the attachment proceedings are valid on *Shipman Coal Company vs. Delaware & Hudson Co., supra.*, and for that purpose have found it necessary to supply facts which the Court did not consider necessary in disposing of that action, or the question certified to the Appellate Court.

The *Shipman Case* held:—that judgments recovered by non-residents against a corporation in an action in a Federal Court in Pennsylvania are subject to attachment in New York in an action against the judgment debtor and judgment creditor, without going into the question of whether the debt was due, or payment of the debt was stayed by a bond on appeal, or payment of the debt was dependent upon a contingency.

The Court further held that the situs of a debt is where the debtor is found, and that in New York a judgment debt is property subject to attachment. But the Court did not couple these holdings with the conditions we have here.

The Court probably omitted the facts supplied by the Petitioners because it did not reverse the previous holdings of the Court that a debt is not attachable unless it is absolutely payable at present or at some future time, *and* not dependable upon any contingency. And if the Court did intend to reverse the previous holdings, it did not thereafter follow the Shipman case on that point, but firmly held to the former position. Therefore, the Shipman case is not authority on the point in question, because it neither reversed the former holding nor was followed thereafter on that point if it did reverse.

We find none of the cases cited by Petitioner holding directly contrary to the principle we have just discussed.

POINT III.

The jurisdiction of the District Court of the United States, and the right of the plaintiff to prosecute his suit in that court having attached, that right cannot be arrested or taken away by any proceedings in another court.

The facts in *Wallace vs. M'Connell,* 13 Pet. 136, 10 L. Ed. 95, show that M'Connell sued Wallace in a United States Court upon a promissory note, and while the cause was still pending, Wallace was garnished in an action in an Alabama state court. Wallace then claimed an abatement of the Federal suit to the extent of the garnishment. The United States court refused and entered judgment. The Supreme Court of the United States affirmed and stated:

"The jurisdiction of the District Court of the United States, and the right of the plaintiff to prosecute his suit in that court having attached, that right could not be arrested or taken away by any proceedings in another court. This would produce a collision in the jurisdiction of courts that would extremely embarrass the administration of justice. * * * * * Where the suit in one court is commenced prior to the institution of proceedings under attachment in another court, such proceedings cannot arrest the suit. * * This * * is essential to the protection of the rights of the garnishee and will avoid all collisions in the proceedings of different courts having the same subject matter before them. In the case now before the court, the suit was commenced prior to the institution of proceedings under the attachment."

In passing upon this question, the Ninth Circuit Court of Appeals having had the benefit of oral argument and the opportunity of discussion, observed that Huron did not seriously question that federal judgments have been held not subject to garnishment in foreign jurisdictions, (*Lincoln Mine Operating Company vs. Huron Holding Corporation,* 111 Fed. 2nd. 438, 440) and cited the following cases:

Wabash Railroad Co. vs. Tourville, 179 U.S. 322, 21 S. Ct. 113, 35 L. Ed. 210;

United States Shipping Board Merchant Fleet Corp. vs. Hirsh Lumber Co., 59 App. D.C. 116, 35 Fed. 2nd, 1010;

Mack vs. Winslow, 6 Cir., 59 Fed. 316, 319;

Henry vs. Gold Park Mining Co., C.C. Colo., 15 Fed. 649, 650;

Thomas vs. Woolridge, 23 Fed. Cas. 986, 987, No. 13, 918;

Franklin vs. Ward, 9 Fed. Cas. 711, No. 5.055;

Freeman, Judgments, 7th Ed. Section 622.

When the action was commenced in the State Court, the action resulting in the judgment of March 3, 1938, was pending in the District Court.

Section 12-606, Idaho Code Ann., provides:

> "An action is deemed to be pending from the time of its commencement *until its final determination upon appeal*, or until time for appeal has passed, unless the judgment is sooner satisfied." (Italics ours).

In *McDonald vs. McDonald*, 56 Ida. 444, 457, 55 Pac. 2nd. 827, the Supreme Court of Idaho made the following statement respecting this statute:

> "There remains for consideration the question as to whether the district court had jurisdiction to entertain the 'Petition for Modification of Decree.' The decree did not award alimony to respondent; it had become final by operation of law, no appeal having been taken, and the time for modification or amendment as provided by statute having expired."

California has an identical statute. (Code Civil Procedure 1872, Sec. 1050; Kerr's Code, Sec. 1050; Deering's Code 1931, Sec. 1050). The Supreme Court of California in *Naftzger vs. Gregg*, 33 Pac. 757, stated:

" *** the judgment *** *had not become final* with reference to the subject matter thereof as the time for appear therein had not expired ***."

And the California court passed upon the point directly in *Arp vs. Blake,* 218 Pac. 773, 777, and stated:

"The garnishment mentioned in the third cause of action as having been served on Arp in 1916 was served pending the appeal in the case of *Blake vs. Arp.* In the case of *Waples-Platter Grocer Co. vs. Tex. & P. Ry. Co.,* 62 S.W. 265, the complaint sounded in unliquidated damages. Garnishment was served pending appeal, and we think the court correctly stated the rule under such circumstances as follows: 'The effect of the appeal was to deprive the judgment of its finality, and it operated to keep alive the case as one of tort as it existed before the judgment was rendered.' "

The Idaho statute last mentioned was adopted in 1881 and follows the California statute of 1872. Therefore, the interpretations of the California courts are applicable and of weight.

The judgment of March 3, 1938, was final for the purpose of appeal, but it was not final in the sense that it constituted the final liquidation of a tort claim, the claim for damages stated in the pleading which commenced the action in the District Court.

The facts in *Waplee-Platter Grocer Co. vs. Tex. & P. Ry. Co.,* 62 S.W. 265, 59 L.R.A. 353, cited by the California Court in *Arp vs. Blake, supra.,* disclose that Downtain sued

the railroad for damages and that the Grocer Company sued Downtain and garnished the railroad company (1) after suit was commenced but before judgment in the trial court; (2) and again after judgment against the railroad company and before appeal was perfected; (3) and again after affirmance on appeal but before petition for rehearing was overruled.

In holding that none of the garnishments were good, the Texas Supreme Court said:

> "The demand" (of Downtain) "being uncertain, is not made certain until the amount is fixed by a final judgment of the court; that is to say, a judgment not merely final in the sense that an appeal lies therefrom, but a judgment final in the sense that it has reached that stage in judicial procedure when it can neither be set aside nor reversed upon appeal * * 'appeal or writ of error, whether prosecuted under cost or supersedeas bond, during pendency, deprives a judgment of that finality of character in support of the right or defense declared by it * ' * * The Court of Civil Appeals" in (in *Kreisle vs. Campbell,* 32 S.W. 581) * * "held in accordance with our opinion."

See also:

Dibrell vs. Neely, 61 Miss. 218.
Kreisle vs. Campbell, 32 S.W. 581 (Tex.)
Burke vs. Hance, 76 Tex. 76, 18 Am. St. Rep. 28.

POINT IV.

Erie Railroad Co. vs. Tompkins, 304 U.S. 64, has not changed the rule that a federal judgment may not be attached in a foreign jurisdiction.

The Erie case, supra, plainly states at page 78, that "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State."

Art. III, Sec. I of the Constitution of the United States provides:

> "The judicial power of the United States shall be vested ***** in such inferior courts as the congress may from time to time ordain and establish ****."

Art. III, Sec. 4, of the same document provides:

> "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States and treaties ***; to all cases *** between citizens of different states ****."

Art. I, Sec. 8, provides:

> "The Congress shall have power **** To constitute tribunals inferior to the Supreme Court. *****
> To make all laws which shall be necessary and proper for carrying into execution the foregoing powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

Congress has provided for appeals, for cost and supersedeas bonds (28 U.S.C. 869, 874), for executions (28 U.S.C. 727, 729), and in this connection has vested the Federal Courts with power and authority necessary for the "trial and disposition of the cause." (28 U.S.C. 729).

In a long line of decisions the Federal Courts have carefully protected federal jurisdictions from interference by state courts, or courts of other jurisdictions.

In *Collin County Nat. Bank vs. Hughes,* 152 Fed. 414, it was held that the jurisdiction of a federal court over the subject matter of and the parties to a judgment includes the power to enforce it, continues until it is satisfied, and may not be destroyed or impaired by the legislation of the states.

In *Riggs vs. Johnson County,* 6 Wall. 166, 187, appears this language:

> "Process subsequent to judgment is as essential to jurisdiction as process antecedent to judgment, else the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution."

and at page 194,

> "Authority of the Circuit Courts to issue process of any kind which is necessary to the exercise of jurisdiction and agreeable to the principles and usages of law, is beyond question, and the power so conferred cannot

be controlled either by the process of the state courts or by any act of a State legislature."

In *Wayman vs. Southard,* 10 Wheat. 1, 22, appears the following statement:

> "The jurisdiction of a court is not exhausted by the rendition of its judgment, but continues until the judgment shall be satisfied."

and in that case the Court held that Congress has, by the Constitution, exclusive authority to regulate the proceedings in the courts of the United States; and the States have no authority to control those proceedings except so far as the state process acts are adopted by Congress, or by the courts of the United States under the authority of Congress.

To the same end that the jurisdiction of a Federal court once lawfully acquired may not be destroyed or restained by legislation of a State, because that jurisdiction is granted by the Constitution and the Acts of Congress which are the supreme law of the land, see

Barber Asphalt Paving Co. vs. Morris, (CCA 8) 132 Fed. 945;

Brun vs. Mann, 151 Fed. 145;

Chicot Company vs. Sherwood, 148 U.S. 529, 533, 534.

In the recent case of *West et al. vs. American Telephone and Telegraph Co.,* decided by this Court on December 9, 1940, it is stated that "the obvious purpose of Sec. 34 of the Judiciary Act is to avoid the maintenance within a state of

two divergent or conflicting systems of law, one to be applied in the state courts, the other to be availed of in the federal courts, only in case of diversity of citizenship."

And in *Neirbo Co. vs. Bethlehem Corp.,* 308 U.S. 165, 175, is found this statement:

> "In finding an actual consent by Bethlehem to be sued in the courts of New York, federal as well as state, we are not subjecting federal procedure to the requirements of the New York law."

It is evident that the Erie case intended to prevent two systems of law in the same jurisdiction and did not intend to subject a federal court and its jurisdiction to the requirements of a state law. The Erie case does not deprive the District Court of its rights under the Constitution and laws of Congress to enter judgment against the National Surety Corporation on the broken conditions in its supersedeas bond. When Huron failed to "make its plea good" on appeal the condition of the bond was broken and the District Court, having jurisdiction of the subject matter, was bound to retain that jurisdiction and enter judgment accordingly without interference from any state court.

If Huron had lawfully satisfied the judgment of March 3, 1938, while it was on appeal in the Circuit Court, it should have so informed the Court because the question submitted to the appellate court had become moot. But Huron did not do so and chose to gamble on the outcome. It was a direct interference with the processes of the federal courts.

Conclusion.

For the above reasons, the Circuit Court of Appeals for the Ninth Circuit should be sustained in its opinion and judgment entered herein, and the District Court should proceed to dispose of the case in conformity with the decision of the Circuit Court and without interference from the process of any other court.

Respectfully submitted,

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